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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In The Matter of	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-98

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, urges the Commission to summarily deny the Joint Motion for Stay Pending Judicial Review filed by GTE Corporation and the Southern New England Telephone Company in the captioned docket and to permit the rules adopted in the First Report and Order implementing the local telecommunications competition provisions of the Telecommunications Act of 1996 to become effective as currently scheduled.

Petitioners have altogether failed to make even an arguable case for grant of the extraordinary relief they request; indeed, not a single element of the Commission's four-pronged test for grant of a stay has been satisfied here. Likelihood of success on the merits on appeal is not demonstrated merely by rehashing positions already addressed by the Commission and thoughtfully resolved in a reasoned and fully defensible manner. Simply put, Petitioners offer no new or different arguments or information which would draw into question the rules and policies adopted by the Commission.

Likewise, Petitioners' vague assertions that irreparable harm will befall them in the absence of a stay do not approach the requisite showing of certain, quantifiable, actual and imminent harm which the Commission has heretofore found essential to grant of a stay. Even a cursory review of the irreparable harm claimed by Petitioners reveals that these claims are predicated on speculation layered upon speculation layered upon speculation. Indeed, not only have Petitioners not shown irreparable harm absent the requested stay, they have failed to demonstrate with any certainty that they will be harmed at all.

Petitioners also assert, in an astounding display of large corporate arrogance, that no other interested party will be substantially harmed by grant of the requested stay. On the contrary, during the pendency of any stay, potential small carrier competitors of Petitioners would be faced with a "Hobson's Choice" -- have either no local service offering or an offering with which they cannot compete. The absence of national guidelines would clearly hinder entry by small carriers into the local telecommunications market and adversely impact their ability to provide competitive local service offerings. Accordingly, there can be no denying that small carriers would be severely harmed by a stay of the effectiveness of the national rules adopted by the Commission.

Equally thin is Petitioners' argument that the public interest would be served by grant of the requested stay. Contrary to Petitioners' apparent belief, their private interests do not equate to the public interest. It goes without saying that Petitioners do not speak for new market entrants and as a representative of hundreds of such potential entrants, TRA can unequivocably assure the Commission that the interests of its resale carrier members would not be furthered by grant of the requested stay. Finally, Petitioners' patronizing view that consumers would be best served by continuation of existing monopolies and delay of competitive entry, while deserving credit for its chutzpa, can be dismissed as borderline frivolous. As noted above, the elected representatives of those consumers have already determined otherwise.

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the "Joint Motion for Stay Pending Judicial Review" ("Joint Motion") filed by GTE Corporation ("GTE") and the Southern New England Telephone Company ("SNET") (collectively, the "Petitioners") in the captioned docket. In the Joint Motion, Petitioners urge the Commission to stay in its entirety the effectiveness of the First Report and Order, FCC 96-325 (released August 8, 1996), and the rules adopted therein. In support of the Joint Motion, Petitioners raise anew and reargue a number of matters already addressed and disposed of by the Commission in the First Report and Order.

As will be discussed in detail below, the Joint Motion is a thinly-veiled attempt by Petitioners to slow the dismantling of their local exchange monopolies and to delay the advent of the local telecommunications competition the Congress envisioned in enacting the

Telecommunications Act of 1996 (the "1996 Act").[1] Indeed, Petitioners have failed to satisfy not one, but all, of the four factors necessary to support grant of the extraordinary relief they request here. TRA, accordingly, urges the Commission to summarily reject the Joint Motion.

I.

INTRODUCTION

TRA, an association of nearly 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services.[2] TRA's resale carrier

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of the resale industry over the past five to ten years have produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

members are also poised to enter the local telecommunications market and to bring to small business and residential users of local service the affordable rates, service diversity and personalized customer service that has allowed them to capture a five to ten percent share of the interexchange market in less than a decade.

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[3] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[4] Thus, an applicant for stay must show that (i) it is likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest. While in some circumstances these criteria can be balanced such that a particularly strong showing under one test can compensate for a weak showing under another, a failure to make a threshold showing under any one of the criteria is generally fatal.[5]

As noted above, Petitioners have satisfied none of these four criteria in their Joint Petition. The Commission has already addressed the various objections raised by Petitioners and

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[3] *See, e.g.,* Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

[4] *See, e.g.,* Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

[5] *See, e.g.,* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd. 5228, ¶ 14 (1990).

has rejected Petitioners' arguments on sound legal and policy grounds. The irreparable injury claimed by Petitioners is far too speculative to warrant grant of the requested stay. Grant of the stay would harm new entrants into the local telecommunications market, particularly smaller providers such as those that comprise the rank and file of TRA. And the public interest certainly would not be served by delaying the availability of competitive local telecommunications services offerings. In short, Petitioners have altogether failed to make even an arguable case for grant of the extraordinary relief they request. The Joint Motion, therefore, should be summarily denied and the procompetitive rules adopted by the Commission in the First Report and Order should be allowed to take effect without delay.

II.

ARGUMENT

A. The Small Carriers That Comprise the Rank And File Of TRA Would Be Harmed If The Requested Stay Were Granted

As noted above, TRA is comprised in large part of small carriers serving primarily small businesses, although residential and mid-sized commercial accounts are not uncommon. Among TRA's resale carrier members, roughly 30 percent have been in business for less than three years and over 80 percent were founded less than a decade ago. And while the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 25 percent of TRA's resale carrier members generate annual revenues of $5 million or less and less than 20 percent have reached the $50 million threshold. Seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent

have workforces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers. And in addition to domestic interexchange and international service, a sizeable percentage of TRA's resale carrier customers are already offering their customers enhanced, wireless and/or internet access services, and will soon be providing local telecommunications service as well.[6]

In crafting rules implementing Sections 251 and 252 of the 1996 Act,[7] the Commission was cognizant of the hurdles small carriers, as new entrants into the local telecommunications market, would face in confronting entrenched incumbent local exchange carriers ("ILECs") possessed not only of monopoly market power, but orders of magnitude greater resources. Thus as a general matter the Commission explained that it adopted "national rules" where:

> they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.[8]

Such an approach, the Commission correctly reasoned, would "assist smaller carriers that seek to provide competitive local service:"

> [N]ational rules will greatly reduce the need for small carriers to expend their limited resources securing their right to

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[6] The data summarized in this section are drawn from a series of surveys undertaken by TRA of its membership over the past two years.

[7] 47 U.S.C. §§ 251, 252 (1996).

[8] First Report and Order, FCC 96-325 at ¶ 41.

> interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state. We agree with the Small Business Administration that national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities. In addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets.[9]

Detailing its rationale for so concluding, the Commission emphasized the "inequality of bargaining power between incumbents and new entrants," explaining that "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."[10] Rather, "[u]nder section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market."[11] Given the "strong incentives" ILECs, like any other monopolists, will have to resist such market intrusion, "rules that have the effect of equalizing bargaining power" are necessary to facilitate competitive entry.[12]

In comments, reply comments and ex parte presentations, TRA strongly and repeatedly urged the Commission to adopt national rules and applauds the Commission for its foresight and its courage in doing so. TRA submits that the Commission was entirely correct

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[9] Id. at ¶ 61 (footnotes omitted).

[10] Id. at ¶ 55.

[11] Id.

[12] Id.

in its assessment that an absence of national guidelines would hinder entry by small carriers into the local telecommunications market and would adversely impact the ability of small market entrants to provide competitive local service offerings. Small carriers would be severely harmed by a stay of the effectiveness of the national rules adopted by the Commission. Small carriers simply do not have the ability to exact equitable service arrangements from ILECs absent guidelines which establish outer bounds of reasonableness. Small carriers do not have the resources to battle individual ILECs over the same issues before 50 plus different regulatory authorities. The Commission is absolutely correct that in order for small carriers to be effective contributors to local telecommunications markets across the nation, they must be able to exploit certain economies of scale derivable only from a national regulatory structure.

To put it bluntly, Petitioners' contention that no interested party would be harmed by grant of the requested stay smacks of large corporate arrogance, which appears all the uglier when contrasted with the thoughtful consideration of small carrier concerns reflected in the Commission's well-reasoned analysis of the need for national rules. Petitioners' suggestion that no harm would befall small market entrants because "competitive entry will move forward on schedule through private negotiations, mediations and arbitrations" would be laughable if it were not so dangerous.[13] It ignores completely the "inequality of bargaining power" the Commission correctly noted necessitated national rules. Certainly, negotiations would go forward in the absence of national guidelines, but they would progress only so far as ILECs dictated and the

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[13] Joint Motion at 35 - 37.

only source of relief -- *i.e.,* state-by-state arbitrations -- do not, as the Commission has recognized, provide financially realistic options for small carriers.

Nor is it an answer to argue that service arrangements that small carriers would be forced to accept could be subsequently renegotiated if the Commission's rules are upheld on appeal. Time is a precious commodity in the rapidly changing telecommunications environment; some small carriers might not survive long enough to derive the eventual procompetitive benefits of the Commission's national rules. A full service offering will become increasingly more important to competitive viability and customer retention over the coming months and years, particularly as ILECs such as GTE and SNET aggressively enter the interexchange market with long distance and local products. During the pendency of any stay, a small carrier would be faced with a "Hobson's Choice" -- have either no local service offering or an offering with which it was unable to compete. Certainly agreements could be renegotiated, but time and competitive advantage could not be recouped and businesses lost in the interim could not be salvaged.

In short, Petitioners' claims to the contrary notwithstanding, small carriers would be severely harmed by grant of the requested stay.

B. The Public Interest Would Be Disserved By Grant Of The Requested Stay

As thin as are Petitioners' arguments that no harm would befall other interested parties if the requested stay were granted, their contentions that the public interest would be served by such an action are perhaps even weaker. Congress made clear in passing the 1996 Act its belief that the public interest would be best served by "opening all telecommunications markets to competition" not only by eliminating legal barriers to market entry, but by dismantling

as well the no less impenetrable practical barriers to entry.[14] In the First Report and Order, the Commission recognized the procompetitive intent of Congress as embodied in the 1996 Act, emphasizing the need to remove all entry barriers if local telecommunications competition is to emerge:

> The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress . . . [T]he removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. . . . Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. . . . The statute also directs us to remove the existing operational barriers to entering the local market.[15]

As the Commission has repeatedly stressed in assessing stay requests in the past, the public is harmed by "a diminution in competition;" stays which "prevent achievement of the public interest benefits . . . [which] will flow from a more competitive . . . market" will be denied.[16] Elsewhere, the Commission has further declared that where "the Congress has explicitly found that the goal of increased competition 'promote[s] the public interest,'" grant of a stay of

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[14] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 113 (1996) ("Joint Explanatory Statement"); 47 C.F.R. §§ 251, 252, 253.

[15] First Report and Order, FCC 96-325 at ¶¶ 1, 10, 11, 16 (footnotes omitted).

[16] *See, e.g.,* Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 9; *see also* Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd. 3214, ¶ 32 (1995) ("[W]e conclude that a stay . . . will not be in the public interest . . . a stay will delay the introduction of new competition and new services to the public").

implementing Commission rules "is not in the public interest."[17] Certainly, the Commission has made clear that consumers should not be denied the benefits of rules adopted to further the public interest simply to protect the private interests of individual parties seeking to delay implementation of those rules.[18]

Petitioners' assessment of the public interest is focused almost exclusively on their own, and purportedly new entrants', private interests. On their own behalf, Petitioners complain of potential "false starts," "one-way ratchet[ing]" by new market entrants, and renegotiation of hundreds of agreements "accomplished through a massive waste of time."[19] For new market entrants, Petitioners raise the same concerns regarding resource consumption, but also emphasize what they characterize as "the significant displacement . . . [that] would upset new entrant network development and business plans."[20] Consumers are given rather short shrift by Petitioners. Having boldly asserted that "competitive entry will proceed on schedule," Petitioners grandly state that "American consumers will be protected . . . from uneconomic entry due to artificial and unlawful regulatory pricing rules."[21]

Contrary to Petitioners' apparent belief, their private interests do not equate to the public interest. It goes without saying that Petitioners do not speak for new market entrants and

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[17] Cellularvision of New York, L.P. v. Sportschannel Associates, Petition for Stay Pending Reconsideration of Order on Program Access Complaint, 10 FCC Rcd. 13192, ¶ 6 (1995).

[18] *See, e.g.,* Dynamic Cablevision of Florida, Ltd., 10 FCC Rcd. 7738, ¶ 16 (1995).

[19] Joint Motion at 39 - 40.

[20] Id. at 40 - 41.

[21] Id. at 41.

as a representative of hundreds of such potential entrants, TRA can unequivocably assure the Commission that the interests of its resale carrier members would not be furthered by grant of the requested stay. Finally, Petitioners' patronizing view that consumers would be best served by continuation of existing monopolies and delay of competitive entry, while deserving credit for its chutzpa, can be dismissed as borderline frivolous. As noted above, the elected representatives of those consumers have already determined otherwise.

C. Petitioners Have Failed To Demonstrate That They Will Suffer Irreparable Harm Absent A Stay

Petitioners, as they must, contend that they will suffer irreparable harm if the stay they have requested is not granted. Petitioners claims in this respect are twofold. First, Petitioners opine that the Commission's rules "will have an irreversible adverse impact on scores of negotiations and binding arbitration proceedings currently under way pursuant to § 252."[22] As explained by Petitioners:

> By providing a detailed set of default terms that the parties will expect to apply in arbitration, the rules will, as a practical matter, take a host of issues off the bargaining table from the outset and drastically reduce the scope of private negotiations. . . . As a result, if the rules are not stayed pending review, GTE, SNET and other incumbent LECs will be forced to choose between two uninviting alternatives. They may enter into "privately negotiated" agreements whose terms are, in reality, dictated by the Commission's rules, or they may have similar terms imposed on them by state Commissions. . . . Even if the current rules are overturned, it will not be possible to undo the harm to incumbents such as GTE and SNET. Even if it were possible to bargain for terms allowing renegotiations if the rules were struck down, it would be

[22] Id. at 25

> impracticable, if not impossible, to undo the effects that the rules would have on scores of agreements negotiated or arbitrated under their shadow.[23]

Second, Petitioners assert that "the rules will cause incumbents to suffer irremediable losses of revenue, market share, and customer goodwill."[24] Thus, Petitioners contend:

> The national pricing standards promulgated by the FCC will immediately allow competitors to undercut incumbent LECs' retail rates. Implementing the pricing standards thus will cause GTE and SNET to suffer a loss of market share or a loss of revenue as they attempt to cut rates to meet competitors' artificial pricing advantage. . . . In addition to the number of subscribers, GTE and SNET will suffer nonquantifiable damage to goodwill as a result of the Commission's rules, which will allow rivals to undercut their prices and effectively hobble their ability to compete.[25]

Even a cursory review of Petitioners' claims of irreparable harm presented above reveals that they are predicated on speculation layered upon speculation layered upon speculation. The Commission has long held that "[t]o show irreparable harm, 'the injury must be both certain and great; it must be actual and not theoretical.'"[26] Moreover, the Commission has required that "the party seeking relief must show that 'the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'"[27] As the

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[23] Id. at 25 - 30.

[24] Id. at 25.

[25] Id. at 30 - 35.

[26] *See, e.g.,* Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd. 3214 at ¶ 29 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[27] Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶ 19, fn. 53 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), *quoting* Ashland Oil, Inc. v. FTC, 409

Commission has steadfastly held, "[b]are allegations of what is likely to occur are of no value since the [Commission] must decide whether the harm will in fact occur. The movant must provide . . . proof indicating that the harm is certain to occur in the future."[28] "[U]nsubstantiated and speculative claims," "generalized assertions," and contentions that "recoupment . .. in the future is 'simply not realistic'" have all been found by the Commission to be inadequate to support a claim of irreparable harm and the grant of a stay.[29]

Here, Petitioners speculate as to the manner in which the States will implement the Commission's pricing standards, the rates and charges that will result from that implementation and the marketplace impact of those rates. With respect to the latter, Petitioners speculate as to the pricing strategies of new market entrants and the response of consumers to those pricing strategies. Not content to guess only at their pricing strategies, Petitioners also speculate as to new market entrants' negotiating tactics and goals, as well as their conduct subsequent to entering into service arrangements with Petitioners. Aggregating all these various layers of speculation obviously renders any claim of irreparable harm hopelessly amorphous.

Petitioners cannot hope to predict how the States will apply the national rules adopted by the Commission or what will be the resultant rates and charges. Nor can Petitioners

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F.Supp 297, 307 (D.D.C.), *afff'd* 548 F.2d 977 ((D.C. Cir. 1976)).

[28] Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991, ¶ 14 (1995) (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[29] *See, e.g.,* Cellularvision of New York, L.P. v. Sportschannel Associates, Petition for Stay Pending Reconsideration of Order on Program Access Complaint, 10 FCC Rcd. 13192 at ¶ 5; Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991 at ¶¶ 14-16; Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶¶ 18-19; Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 8; Cincinnati Bell Telephone Company, 8 FCC Rcd. 6709, ¶ 10 (1993).

predict what rates and charges will result from voluntary negotiations with new market entrants. Petitioners cannot know what, if any, default pricing proxies the States will apply and whether these default pricing proxies would be greater or lesser than the rates and charges the States would otherwise have set. Petitioners cannot predict the outcomes of State-conducted economic cost studies or whether the resultant rates and charges will exceed those the States would otherwise have dictated. Petitioners cannot anticipate any, much less all, State-specific methodological variations, including those contemplated by the Commission -- *e.g.,* flexible identification of avoided cost models and rebuttable presumptions of avoided cost identification by USOA expense accounts[30] -- and those permitted on an ad hoc basis pursuant to subsequently-granted waivers. Nor can Petitioners forecast the impact of universal service reform on their overall telecommunications revenues and competitive position in the local exchange market.

Certainly, Petitioners have no way of knowing how competitors will price or package their local service offerings, much less whether they will be able or willing to "undercut" Petitioners' prices. And Petitioners cannot hope to predict the reaction of consumers to competitive service alternatives irrespective of the manner in which they are priced or packaged or the impact of such consumer reaction on Petitioners' revenue generation. Indeed, Petitioners, like many network providers in the interexchange environment, may find the wholesale telecommunications business to be highly lucrative.

The impact of the Commission's rules on Petitioners is subject to far too many variables to predict with any degree of accuracy. Actions by the Commission, the States, new

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[30] First Report and Order, FCC 96-325 at ¶¶ 909.

market entrants and consumers, not to mention Petitioners themselves, will all be consequential. Certainly, Petitioners will lose customers and market share, but that is exactly what Congress intended. Whether Petitioners overall will fare better or worse under the regulatory regime adopted by the Commission, however, remains to be seen. It is just as easy to argue that Petitioners will generate greater aggregate telecommunications revenues in the future under this regime as it is to argue that their revenues will decline. Neither assessment is any more or less speculative than the other.

In short, not only have Petitioners not shown irreparable harm absent the requested stay, they have not demonstrated with any certainty that they will be harmed at all.

D. Petitioners Have Not Shown A Likelihood of Success On The Merits On Appeal

Petitioners raise a host of objections to the Commission's First Report and Order, suggesting that "[t]he Commission's rules rest on a series of errors that ensure the rules will be overturned in whole or in part upon review."[31] Chief among Petitioners' objections are claims that "by adopting detailed pricing standards for agreements under the Act, the Commission has exceeded its statutory authority and usurped a role specifically assigned by the Act to state commissions" and that the Commission's "Total Long Run Incremental Cost plus" methodology ("TELRIC") "would accomplish an uncompensated taking of property in violation of the Fifth Amendment."[32] Petitioners also complain that the Commission acted arbitrarily and capriciously in setting default proxy prices "that are not themselves based on the methods the Commission

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[31] Joint Motion at 6.

[32] Id. at 6 - 18.

has prescribed for determining rates."[33] Finally, Petitioners object to a wide variety of Commission judgments, including, among others, using "avoidable" rather than "avoided" costs, incorporating features, functions and capabilities into unbundled network elements, allowing "virtual networks" to be comprised entirely of unbundled network elements, and ultimately exempting all "virtual network" operators from payment of access charges.[34]

Although TRA will address below certain of Petitioners arguments, no such rebuttal is actually necessary. Petitioners have merely raised anew issues that they argued before the Commission prior to the issuance of the First Report and Order. All of these matters have already been addressed by the Commission and thoughtfully resolved in a reasoned and fully defensible manner. Petitioners offer no new or different arguments or information which would drqw into question the rules and policies adopted by the Commission. Accordingly, the Joint Motion should be summarily denied.

1. The Commission's Pricing Standards Will Not Produce An Uncompensated Taking In Violation Of The Fifth Amendment

Petitioners' contention that the costing and pricing methodologies adopted by the Commission will produce uncompensated takings in violation of the "due process" clause of the Fifth Amendment of the United States Constitution is predicated on a number of erroneous legal conclusions and hence without merit. Contrary to Petitioners' apparent belief, no Constitutional

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[33] Id. at 18 - 22.

[34] Id. at 22 - 24.

claim exists to any given rate-setting methodology.[35] Certainly, rates must be set above "confiscatory levels," but recovery of "historical" or "embedded" costs is not Constitutionally mandated.[36]

Ratemaking does not become "confiscatory" simply because a regulated carrier fails to recover some portion of its embedded costs. Rather, a rate methodology will pass Constitutional muster if the total effect thereof reasonably balances investor and consumer interests.[37] As the U.S. Supreme Court has long recognized, agencies are "not bound to the use of any single formula or combination of formulas in determining rates:"

> It is the result reached not the method employed which is controlling . . . It is not theory but the impact of the rate order which counts.[38]

And an end result is Constitutionally permissible if it produces rates which "enable the company to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risks assumed . . . even though they might produce only a meager return on the so-called 'fair-value' rate base."[39]

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[35] Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944); Wisconsin v. Federal Power Commission, 373 U.S. 294, 309 (1963); Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989).

[36] Federal Power Commission v. Texaco, Inc., 417 U.S. 380, 391-92 (1974); Duquesne Light Co. v. Barasch, 488 U.S. 299 at 307.

[37] Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 at 603.

[38] Id., 320 U.S. 591 at 602.

[39] Id., 320 U.S. 591 at 605.

Contrary to the beliefs of many ILECs, nothing in the Constitution shields carriers from losses or insulates its investors from declining investment values. Given that it permits ILECs to recover their forward-looking economic costs, as well as a reasonable share of forward-looking joint and common costs, the TELRIC costing methodology will certainly allow carriers to maintain their financial integrity, attract capital and compensate investors and hence cannot be deemed to be confiscatory. Moreover, the U.S. Supreme Court has recognized that costing methodologies which mimic the operation of competitive markets are permissible so long as they do not jeopardize the operating and financial integrity of carriers.[40] And that is precisely what the TELRIC model is designed to accomplish:

> In dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs. . . .Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and compete effectively, which should drive retail prices to their competitive levels. We belie that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents.[41]

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[40] Duquesne Light Co. v. Barasch, 488 U.S. 299 at 316, n. 10, 308-09; *see also* Metropolitan Transportation Authority v. Interstate Commerce Commission, 792 F.2d 287, 297 (2d. Cir. 1986), *cert denied* 479 U.S. 1017 (1986).

[41] First Report and Order, FCC 96-325 at ¶¶ 620, 679.

2. The Commission Has Not Exceeded Its Authority In Adopting National Pricing Standards

Petitioners' contention that the Commission has exceeded its statutory authority by adopting national pricing standards is no less flawed. The Commission is correct in its view that in the 1996 Act, "Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act."[42] The 1996 Act clearly expands the scope of federal authority into historically intrastate matters. In some instances, such expansion is explicitly noted, such as in Section 251(e)(1), 253 or 276(b)(1);[43] in other instances, it is clear from the nature of the Congressional directive. Section 251(d)(1)'s mandate that the Commission adopt regulations implementing Section 251 is an illustration of the latter category, given that Section 251 addresses primarily local telecommunications matters.[44]

A component of the broad Section 251(d)(1) directive is that the Commission implement the Section 251(c)(2), (3) and (4) requirements that interconnection be provided and unbundled network elements be made available on rates, terms and conditions that are just, reasonable and nondiscriminatory," and that retail services be offered at "wholesale rates."[45] This the Commission has done -- as it was required to do -- by adopting national pricing rules which will be applied by the States in accordance with Section 252(d). Section 252(d), in turn, directs the States to actually set rates, applying in so doing the implementing rules adopted by the

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[42] Id. at ¶ 83.

[43] 47 U.S.C. §§ 251(e)(1), 253, 276(b)(1).

[44] 47 U.S.C. §§ 251(d)(1).

[45] 47 U.S.C. §§ 251(c)(2), 251(c)(3), 251(c)(4).

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to summarily deny the Joint Motion for Stay Pending Judicial Review filed by GTE Corporation and the Southern New England Telephone Company in the captioned docket and to permit all of the rules adopted in its First Report and Order to become effective as currently scheduled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeannine M. Greene, hereby certify that copies of the foregoing document were mailed this 4th day of September, 1996, by United States First Class mail, to the following:

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